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Supreme Court, U.S.
FILED
APR 1 1994
OFFICE OF THE CLERK

NO. 93-1398

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1993

DAVID G. STAUFFACHER,

Petitioner,

v.

TELEDYNE CONTINENTAL MOTORS,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

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15 pp

QUESTIONS PRESENTED

1. In a case based on diversity jurisdiction in which a plaintiff alleges breach of warranty, do the trial court's decisions to set aside a jury verdict and after a second trial to grant judgment to the defendant as a matter of law because of the absence of adequate evidence of damages raise an issue appropriate for this Court's discretionary review?

2. Does the trial court's decision to set aside the jury verdict constitute an abuse of discretion?

3. Does the trial court's decision to grant judgment to the defendant as a matter of law because no reasonable juror could find damages with reasonable certainty constitute error?

PARTIES

Petitioner, David G. Stauffacher ("Stauffacher"), is an individual citizen of Wisconsin.

Respondent, Teledyne Continental Motors Aircraft Products ("Teledyne"), is a non-Wisconsin Corporation and a division of Teledyne Industries, Inc., a California corporation with its principal place of business in California. Teledyne Industries, Inc., is a subsidiary of Teledyne, Inc., a Delaware corporation.

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TO THE HONORABLE SUPREME COURT:

The Respondent, TELEDYNE CONTINENTAL MOTORS AIRCRAFT PRODUCTS ("Teledyne"), respectfully requests that this Court deny the Petition for Writ of Certiorari submitted by the Petitioner, DAVID G. STAUFFACHER.

OPINIONS BELOW

In an unpublished decision, the Seventh Circuit Court of Appeals affirmed the trial court's decisions granting Teledyne a new trial and granting it judgment as a matter of law. None of the decisions is published. They are reproduced in the Appendix to Stauffacher's Petition for Writ of Certiorari ("App.").

JURISDICTION

Petitioner seeks certiorari pursuant to 28 U.S.C. § 1254(1) of a decision of the United States Court of Appeals for the Seventh Circuit, which denied rehearing of the decision on December 7, 1993.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

No federal or state constitutional or statutory provision is involved in this diversity action.

STATEMENT OF THE CASE

Alleging that the Teledyne engine in his Piper Malibu airplane failed to perform, Stauffacher sued the manufacturer for breach of warranty, fraud, and strict liability. The trial court's jurisdiction was based on diversity in that Stauffacher was a citizen of Wisconsin and Teledyne was a non-Wisconsin citizen. The trial court (Hon. Barbara B. Crabb, Chief Judge) dismissed the strict liability claim before trial based on the Wisconsin economic loss doctrine, which holds that, in the absence of personal injury or damage to other property, a purchaser of an allegedly defective product covered by warranty cannot sue in negligence or strict products liability. At

the close of Stauffacher's case, the court granted judgment as a matter of law in favor of Teledyne on the fraud claim, finding the evidence insufficient to support the claim.

Judge Crabb allowed the breach of warranty claim to go to the jury, which returned an award of $75,000. The trial court granted Teledyne's motion for a new trial finding the evidence insufficient to support a claim for breach of warranty or to show any damages. Judge Crabb also carefully explained what Stauffacher would need to show in his second trial to cure the defects in his damage evidence.

At the second trial, the little new evidence Stauffacher offered actually undercut his damage claim. At the close of Stauffacher's case, Judge Crabb granted judgment as a matter of law in favor of Teledyne.

Stauffacher appealed both the granting of a new trial and the judgment as a matter of law. He also challenged the dismissal of the strict products liability cause of action and various other rulings of the trial court. He raised no constitutional issue.

The Seventh Circuit, in an unreported decision, found that Stauffacher failed at either trial to prove damages with reasonable certainty. The court of appeals had no need to reach any other issue. Stauffacher's Petition for Rehearing and Rehearing in Banc was denied.

SUMMARY OF THE ARGUMENT

I. This case presents no issue appropriate for the Court's exercise of its discretionary jurisdiction. It merely challenges the trial court's decisions on dispositive fact-specific evidentiary issues.

II. The Seventh Circuit correctly held that the damage evidence Stauffacher presented at both his trials was inadequate.

III. The Seventh Circuit correctly affirmed the trial court's evidentiary rulings.

IV. No other issue calls for this Court's review.

ARGUMENT AND AUTHORITIES

I. THIS CASE PRESENTS NO ISSUE APPROPRIATE FOR THE COURT'S EXERCISE OF ITS DISCRETIONARY JURISDICTION.

"A review on writ of certiorari is not a matter of right, but of judicial discretion." Sup. Ct. R. 10.1. There must be "special and important reasons" to grant review. *Id.* Among the reasons that the Court considers in exercising its discretion are:

> (a) When a United States court of appeals has rendered a decision in conflict with the decision of another *United States court of appeals* on the same matter; or has decided a *federal question* in a way in conflict with a state court of last resort; or has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's power of supervision.

Id. (emphasis added).

Not a single one of these reasons is present here. Stauffacher claims that the trial court's decision on economic loss conflicts with Wisconsin *state* court precedent. Even if this met the criteria for review, no such conflict exists. The district court's decision on this issue is squarely in line with the leading Wisconsin Supreme Court case on the economic loss doctrine, *Sunnyslope Grading, Inc. v. Miller, Bradford, & Risberg, Inc.*, 148 Wis. 2d 910, 921, 437 N.W.2d 213 (1989); and its progeny, including *Northridge Co. v. W.R. Grace & Co.*, 162 Wis. 2d 918, 933-34, 471 N.W.2d 179 (1991) (claims of product inferiority or performance failure are the essence of a claim for economic loss); and *Midwhey Powder Co. v. Clayton Indus.*, 157 Wis. 2d 585, 591, 460 N.W.2d 426 (Ct. App. 1990) (damage by a component part to an "integral" system is not "other property" damage).

No federal question is involved in this diversity suit. The decision reflects no departure from accepted or usual judicial proceedings; indeed, the decision is quite run-of-the-mill. The Seventh Circuit merely affirmed the trial court's fact-specific determination on the adequacy of Stauffacher's damage evidence.

Just as he did below, Stauffacher attempts to turn this routine evidentiary decision into a federal case by raising in "scattershot fashion, . . . virtually every substantive and evidentiary decision of the district court." App. 11-12. Many of his suggestions for review are, although confusingly presented, mere repetitions of the dispositive evidentiary issue or otherwise inappropriate for certiorari. Thus, Stauffacher claims for the first time that the dismissal of his strict products liability claim implicates his Fifth Amendment right to due process. The settled practice of this Court is that new questions may not be raised for the first time on Supreme Court review. *Johnson v. Transportation Agency*, 480 U.S. 616, 620 n.2 (1987); *EEOC v. Federal Labor Relations Auth.*, 476 U.S. 19, 23-24 (1986). There is no reason to depart from that practice here.

Even if this issue had been presented to the lower court, it would be inappropriate for review. A purchaser of a defective product has no constitutional right to sue in tort, as opposed to warranty, when, under state law, the tort cause of action fails to state a claim. Fed. R. Civ. P. 12(b)(6).

In rejecting Stauffacher's appeal the Seventh Circuit said, "Usually a plaintiff gets one bite at the apple. Stauffacher had two." App. 48. Now, with this Petition for Certiorari, Stauffacher seeks yet a *third* bite at that apple. Nothing in this Court's rules or precedent warrants such attention.

II. THE SEVENTH CIRCUIT CORRECTLY DECIDED THAT THE DAMAGE EVIDENCE AT BOTH TRIALS WAS INADEQUATE.

A. *The Damage Evidence at the First Trial Did Not Support the Jury Verdict.*

The Seventh Circuit correctly applied an abuse of discretion standard to Judge Crabb's decision to grant a new trial. App. 20 (citing *Timmerman v. Modern Indus., Inc.*, 960 F.2d 692, 698 (7th Cir. 1992)). This Court should not upset the court of appeals' affirmation of this routine exercise of trial court discretion.

The Seventh Circuit also correctly decided that the evidence at the first trial supplied no reasonable basis for an award of *any* damages, "let alone the $75,000 that the jury awarded to Stauffacher." App. 20. The court of appeals correctly disregarded as speculative evidence of the decline in market value of the airplane in the absence of any evidence of the contribution to that decline of the allegedly defective engine. *Id.* at 22. The court similarly rejected testimony about the airplane's depreciation for the same reason — Stauffacher failed to apportion any amount of the depreciation to the allegedly faulty engine. *Id.* at 25. Finally, the court correctly disregarded Stauffacher's own testimony about damages as unspecific and inadequately documented. *Id.* at 26.[1]

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[1]The court of appeals also correctly held that the absence of any damages mandates judgment in Teledyne's favor. App. 15-16. Stauffacher's confused argument that he should be entitled to other remedies, such as declaratory relief and replacement, in the absence of any damage is unavailing. If Stauffacher was not damaged, he is not entitled to a new engine or a declaration that he can get such relief.

Although the fraud and strict products liability claims were dismissed on other grounds, the absence of damages provides an additional basis for dismissal of these tort claims. As the Seventh Circuit correctly held, damages are an indispensable element of a tort claim. App. 13 (citing *Warner/Elektra/Atlantic Corp. v. County of DuPage*, 991 F.2d 1280, 1282 (7th Cir. 1993)).

In sum, the evidence on damages was entirely speculative. *Ma v. Community Bank*, 686 F.2d 459, 466 (7th Cir.), *appeal dismissed and cert. denied*, 459 U.S. 962 (1982); *Olympia Hotels Corp. v. Johnson Wax Dev. Corp.*, 908 F.2d 1363, 1372 (7th Cir. 1990). The district court correctly set aside the verdict, and the court of appeals correctly affirmed that decision.

B. *The Damage Evidence at the Second Trial Was Insufficient to Allow the Case to Go to the Jury.*

The court of appeals correctly reviewed Judge Crabb's decision to enter judgment in favor of Teledyne at the end of the second trial under a *de novo* standard. *Garrett v. Barnes*, 961 F.2d 629, 632 (7th Cir. 1992).

Indeed, as the court of appeals found, the evidence from Stauffacher's own expert at the second trial demonstrated that because Teledyne had given him a remanufactured engine, Stauffacher was actually better off than had the original engine not allegedly malfunctioned. App. 31.

Judge Crabb's decision to grant judgment to Teledyne has been reviewed by an appellate panel and affirmed. There is no reason to re-review this heavily fact-specific question.[2]

III. THE COURT OF APPEALS CORRECTLY AFFIRMED THE DISTRICT COURT'S EVIDENTIARY RULINGS.

Stauffacher also seeks review of the court of appeals' affirmance of the trial court's evidentiary rulings. The court of appeals properly noted that its review of trial court evidentiary matters is "deferential" and judged under an abuse of discretion

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[2]Neither this decision nor the earlier one to set aside the jury verdict implicates the Seventh Amendment. Stauffacher has no right to get to a jury in the absence of evidence that would permit a rational fact-finder to reach a verdict in his favor. Fed. R. Civ. P. 50 (a) and (b); *see Neeley v. Martin K. Eby Constr. Co.*, 386 U.S. 317, 321, 330 (1966) (entry of judgment notwithstanding the verdict under Fed. R. Civ. P. 50(b) does not contravene the Seventh Amendment).

standard. App. 40 (citing *Stutzman v. CRST, Inc.*, 997 F.2d 291, 299 (7th Cir. 1993)). The court of appeals also correctly found no abuse of discretion. App. 41.

Thus, the court of appeals found no abuse of discretion in Judge Crabb's decisions that: (1) Stauffacher was not an expert on the airplane's loss of value, and his theory of loss of value was without rational basis, App. 41-42; and (2) neither Stauffacher nor his expert could testify about damage theories that lacked well-founded assumptions or proper foundation and were, in the court's words, mere "guesstimates." App. 43-47.

Evidentiary rulings are quintessentially matters of trial court discretion. These rulings, affirmed by the court of appeals, should not be disturbed.

IV. THE TRIAL COURT CORRECTLY APPLIED WISCONSIN LAW IN DISMISSING THE STRICT PRODUCTS LIABILITY CAUSE OF ACTION.

Stauffacher challenges the dismissal of his tort claim for strict products liability. Stauffacher agrees that the issue is governed by Wisconsin law. Stauffacher claims, however, that the dismissal of his tort claim is inconsistent with Wisconsin case law. Stauffacher misreads that law.

The leading case on the economic loss doctrine in Wisconsin is *Sunnyslope*, 148 Wis. 2d 910. There, the Wisconsin Supreme Court joined the majority of jurisdictions and held that, in the absence of personal injury or property damage other than damage to the product itself, "a commercial purchaser of a product cannot recover solely economic losses from the manufacturer under negligence or strict liability theories . . . . " *Id.* at 921; *see also id.* at 911.

Following *Sunnyslope*, the Wisconsin Court of Appeals held that when a defective component allegedly damages the machine or system of which it forms an integral part, there is no "other property" damage. *Midwhey*, 157 Wis. 2d at 590-91.

Stauffacher alleged neither personal injury nor damage to any property other than to the airplane itself. The district court correctly applied the *Sunnyslope* doctrine to the facts of this case and dismissed Stauffacher's strict products liability claim.[3]

CONCLUSION AND REQUEST FOR DENIAL

This case presents no question beyond the specific facts related to Petitioner's damage claim. Teledyne asks that the Court deny Stauffacher's Petition for Writ of Certiorari, because the case presents no issue appropriate for the Court's review and the lower courts' holdings were correct.

Respectfully submitted,

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April 1, 1994

[3]In *Northridge*, 162 Wis. 2d 918, unlike here, the plaintiffs did not allege mere performance failure, but other property damage — that asbestos in a building damaged the building and its ambient air. *Id.* at 923, 937.